Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-208

IN THE

Supreme Court of the United States

October Term, 1980

GILBERT EWALD,
Petitioner,
v.
THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

Should a complainant who resides in a state which prohibits age discrimination in employment be granted the extended 300 day federal filing period provided by §626(d)(2) of the Age Discrimination in Employment Act even though he did not initiate federal proceedings within the 180 day period provided by §626(d)(1) of the Act and did not initiate state proceedings until more than 300 days after his termination?

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STATEMENT OF THE CASE

Petitioner, Gilbert Ewald, was employed by Respondent, The Great Atlantic & Pacific Tea Company, Inc., until his termination on April 21, 1975. Petitioner's age at the time of his termination was 41 years, 8 months.

On January 26, 1976 (280 days after his termination), Ewald gave notice to the Department of Labor of his intention to contest his termination by bringing suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA").

By letter dated March 25, 1976 (339 days after his termination) Ewald filed a complaint under the Michigan Fair Employment Practices Act, Mich. Comp. Laws §423.301 *et seq.*, alleging that his termination was age discriminatory.[1]

Ewald subsequently commenced this action in the United States District Court for the Eastern District of Michigan, Northern Division, alleging that his termination of employment was because of age in violation of the ADEA. The District Court thereafter granted Respondent's motion for summary judgment on the grounds that Ewald failed to give notice, within 180 days of his termination, as required by the ADEA, 29 U.S.C. §626(d)(1).

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1. While not relevant to any question here presented, the Sixth Circuit's opinion below incorrectly sets forth "319" rather than "339" as the number of days between Petitioner's termination (April 21, 1975) and the filing of Petitioner's state complaint (March 25, 1976). This error apparently resulted from a typographical error in Respondent's brief below which inadvertently carried over into the Court's Opinion.

Summary of Argument.

The United States Court of Appeals for the Sixth Circuit affirmed, holding that the extended (300-day) notice period of §626(d)(2) of the ADEA is not available to a claimant, like Ewald, who fails to commence state proceedings within 180 days after the alleged act of discrimination. Indeed, Ewald did not even initiate state proceedings until 339 days after his termination. The current Petition For Writ Of Certiorari followed.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit is consistent with the legislative history and with the Congressional purposes behind the notice provisions of the ADEA.

If Petitioner's suggested interpretation of these ADEA notice provisions were adopted, there would exist two arbitrary and irrational notice periods under the ADEA. Persons whose claims arose in states where state law, as well as federal law, prohibits age discrimination in employment would receive 120 more days to assert their complaints than is afforded to persons whose claims arise in states without such state laws and whose claims are protected only by federal law.

Contrary to Petitioner's position, an employer located in a state where both federal and state laws exist (a "dual-law" state) is entitled to just as much notice of an age claim against it as is an employer located where only federal law prohibits age discrimination (a "federal-law only" state). An ADEA claimant in a dual-law state should be held to the same standard of diligence as a claimant protected only by federal law.

Argument.

Petitioner's suggested interpretation of the ADEA filing provisions is in direct conflict with the Congressional intent underlying these provisions as recognized by this Court in *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

The Sixth Circuit's decision is correct and conflicts with no prior decision of this Court. To the extent that a conflict exists in the Circuit Courts on this issue, that conflict has resulted because the Circuits addressed different questions or because they read over-broadly prior, non-conflicting decisions of this Court.

ARGUMENT

I. The Decision Of The Sixth Circuit Is Not In Conflict With Any Applicable Decision Of This Court And Is, In Fact, Required By Prior Decision Of This Court.

Petitioner appears to contend that the decision of the United States Court of Appeals for the Sixth Circuit in this case is inconsistent with the opinions of this Court in *Mohasco v. Silver,* 48 U.S.L.W. 4851 (June 23, 1980) and *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979). No such conflict exists. Indeed, the decision of the Sixth Circuit is entirely consistent with, and is required by, the decision of this Court in *Oscar Mayer.*

Mohasco was not an ADEA case at all; it was a Title VII case which presented the narrow question of the Congressional intent underlying the word "filed" as that word appeared in two different subsections of §706 of Title VII, 42 U.S.C. §2000e-5.[2]

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2. *Mohasco v. Silver,* 48 U.S.L.W. at 4851.

Argument.

It is true that there are similarities between the Title VII and ADEA charge or notice filing provisions. There are also, however, marked differences in these provisions—differences which have been specifically recognized by an earlier decision of this Court and which are critical to the disposition of the present case. As this Court noted in *Oscar Mayer*,[3] Title VII's statutory scheme mandates *sequential* filing of state and federal charges and requires an initial 60 day period of exclusive state jurisdiction. Title VII charges lodged initially with the EEOC must be "deferred" to the state deferral agency, if one exists. The ADEA, on the other hand, provides for no period of exclusive state jurisdiction, but rather permits *concurrent* state and federal administrative jurisdiction. There is no "deferral" provision or requirement under the ADEA.[4]

The rationale of this Court's decision in *Mohasco*—ordinarily requiring a filing of state charges in Title VII deferral states within 240 days of the event complained of—is entirely premised upon this Title VII 60 day period of exclusive state jurisdiction. In short, the reasoning of this Court was that a Title VII deferral state complainant must file state charges within 240 days inasmuch as delay beyond this 240 day period would render it impossible for the complainant to meet Title VII's requirement of a 60 day period of exclusive state

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3. 441 U.S. at 756.

4. Inasmuch as the ADEA contains no deferral provisions, it is both erroneous and misleading to employ the Title VII jargon of "deferral" vs. "non-deferral" states in an ADEA context. That terminology has no application under the ADEA. The appropriate distinction under the ADEA, and employed in this Brief, is a "dual-law" state vs. a "federal-law only" state.

jurisdiction while, at the same time, meeting the extended 300 day federal filing period applicable in Title VII deferral state situations.[5]

Obviously, inasmuch as the ADEA contains no period of exclusive state jurisdiction over, and no requirement of deferral of, complaints of age discrimination, the logic of the Court's *Mohasco* decision has no application under the ADEA. Stated differently, the 240 day period which figures so prominently in the Court's decision in *Mohasco* has no relevance or application at all under the ADEA.[6]

Similarly, contrary to Petitioner's contentions, the decision of the Sixth Circuit does not conflict with this Court's decision in *Oscar Mayer*. The question presented to the Sixth Circuit in the present case was quite different from the one presented to this Court in *Oscar Mayer*. In the present case, the question was whether an ADEA complainant in a dual-law state who did not file his federal claim until 280 days after his termination, and who did not file his state claim until 339 days after his

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5. The only exception to this 240 day filing period would occur if a claimant filed beyond the 240 day period and the state or local agency happened to complete its processing of the charge within the 60 days remaining until the expiration of the extended 300 day period. *Mohasco v. Silver*, 48 U.S.L.W. at 4852-4853 n.16.

6. It should be noted that even if one were to wrongly, and mechanically, apply the 240 day period established in *Mohasco* to an ADEA action, Petitioner here did not even meet that 240 day period. He delayed some 339 days before commencing state proceedings. In short, *Mohasco* not only dealt with critically different statutory schemes, it also dealt with a factual situation markedly different from that presented to the Sixth Circuit below.

termination, was entitled to the benefit of the extended 300 day federal filing period provided by §626(d)(2). That question was not presented to this Court in *Oscar Mayer* since the claimant there had filed with the federal agency within 180 days of the alleged act of discrimination. The complainant in *Oscar Mayer* did not need the benefit of the extended 300 day period of §626(d)(2) in order to be timely and the only question presented there was whether a timely state filing was an ADEA jurisdictional prerequisite.[7]

Beyond the absence of any conflict between the Sixth Circuit's decision here and the prior decisions of this Court, an application of the considerations and principles announced by this Court in *Mohasco* and *Oscar Mayer* require the decision reached by the Sixth Circuit.

As this Court noted in *Mohasco,* the purpose of the Title VII extended filing period in deferral states was to accommodate the required initial 60 days of exclusive

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7. While *Oscar Mayer* did not deal with the question which was before the Sixth Circuit in the present case, it was noted by the Sixth Circuit below (See Petition Appendix at A11), as well as by the First Circuit in *Ciccone v. Textron, Inc.,* 616 F.2d 1216, 1221 (1st Cir. 1980), *pet. for cert. pending,* No. 79-1970 (filed June 16, 1980), that at least one footnote statement of this Court in *Oscar Mayer* indicates that had this Court faced the question in *Oscar Mayer* it would have decided the matter as did the Sixth and First Circuits. In footnote 11 of the *Oscar Mayer* opinion, this Court stated:

> "In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor." (citations omitted). 441 U.S. at 764 n.11.

state jurisdiction while, at the same time, preventing a forfeiture of a complainant's federal rights. Since the ADEA permits concurrent filings and does not require deferral, the extended filing period in dual-law states is not necessary under the ADEA to protect complainants against any loss of federal rights. Petitioner would have this Court conclude that Congress, nevertheless, maintained the extended 300 day filing period under the ADEA (while eliminating the sequential filing required by Title VII) simply to provide an arbitrary 120 day period as a "windfall" to complainants who happen to reside in a state which prohibits age discrimination in employment. Under Petitioner's interpretation of the Act, a complainant whose claim arises in a federal-law only state must file his charge within 180 days of the act complained of, whereas a complainant in a dual-law state—simply because his action arises in a state where state law prohibits age discrimination in employment—can delay for 300 days before filing any charge anywhere.[8]

The legislative history suggests no such irrational Congressional scheme. The history suggests that Congress assumed that the ADEA extended 300 day filing period would be available as an accommodation only to

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8. If, as Petitioner contends, Congress intended that dual-law state complainants would automatically have the benefit of the extended 300 day filing period merely by virtue of their residing in a dual-law state—and without their doing anything further—it is difficult to discern why Congress would so discriminate against federal-law only state complainants by requiring considerably greater diligence (i.e., filing within 180 days) from such persons. It would have been a very simple matter for Congress to have treated all alike by enacting a consistent 300 day filing period applicable to all.

those who voluntarily chose to file with the state *during the initial federal filing period.* In no event would this extended filing period be available to someone who, like Petitioner here, delayed more than 300 days before initiating any state proceeding:

> "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a State statute this period shall be *extended* to 300 days." (Emphasis added.) S. Rep. No. 723, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 31251 (1967), 113 Cong. Rec. 31251 (90th Cong. 1st Sess. 1967).
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> "[T]he notice to be filed by an individual who wishes to bring suit must be filed within 180 days of the occurrence of the alleged unlawful practice, except that where a State *has undertaken* action in accordance with its laws, an individual must file his notice within 300 days of the alleged unlawful practice." (Emphasis added.) S. Rep. No. 723, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 31252 (1967) (Section by Section Analysis).

As noted above, in the present case, Petitioner did not even initiate state proceedings within 300 days of his termination; hence, no state had "undertaken action" nor "commenced" processing his charge until after the extended 300 day period had expired.

Beyond this, this Court, and various Circuit Courts, have concluded that the relatively short filing periods under the ADEA and Title VII were for the benefit of employers, *Mohasco Corp. v. Silver,* 48 U.S.L.W. at 4854;

Powell v. Southwestern Bell Telephone Co., 494 F.2d 485, 488 (5th Cir. 1974); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd by an equally divided Court*, 434 U.S. 99 (1977). Specifically, such short periods insure prompt notice to the employer of the claim and permit early efforts to resolve the matter or an early opportunity for the employer to gather or preserve evidence necessary to defend against the claim.

Contrary to Petitioner's interpretation of the ADEA filing provisions, there is no reason to believe that Congress intended that employers in certain states have, or need, less notice than employers in other states. Moreover, this Court specifically noted in *Mohasco* that, even under Title VII's filing provisions:

> "(Nothing) in the legislative history contains any 'suggestion that complainants in some States were to be allowed to proceed with less diligence than those in other states.'" 48 U.S.L.W. at 4854.

Additionally, this Court noted in *Oscar Mayer* that the rationale for the Congressional decision to permit concurrent filings under the ADEA, rather than the mandatory sequential filings of Title VII, was to avoid the delay occasioned by Title VII's sequential filing scheme and to permit more expedited processing of age claims.[9] Petitioner's interpretation of the ADEA filing provisions, of course, would produce just the reverse result (i.e., would permit *less* diligence and more delay from an ADEA dual-law state claimant than from a Title VII deferral state claimant). Under Petitioner's interpretation, an ADEA dual-law state complainant would automatically have 300 days to file his charge whereas Title VII deferral state complainants must file

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9. *Oscar Mayer Corp. v. Evans*, 441 U.S. at 757.

their charges within 240 days to insure timeliness, *Mohasco Corp. v. Silver, supra.* This result is entirely inconsistent with Congressional intent as discussed by this Court in *Oscar Mayer.*

II. To The Extent That A Conflict Exists Between The Circuit Courts Of Appeal, It Is Not Of A Nature Dictating Review On Writ Of Certiorari.

Petitioner correctly notes that the decision of the Ninth Circuit Court of Appeals in *Bean v. Crocker National Bank,* 600 F.2d 754, 759 (9th Cir. 1979) conflicts with both the Sixth Circuit's decision in the present case and with the First Circuit's holding in *Ciccone v. Textron, Inc., supra.*

This Court should note, however, that the issue currently in question was merely a side issue in *Bean,* applicable to only one of eleven named plaintiffs in that complicated class action litigation purportedly brought on behalf of more than 1000 terminated persons.

The Ninth Circuit in *Bean* analyzed no ADEA decision other than this Court's decision in *Oscar Mayer* and the Ninth Circuit did not have the benefit of either briefs or argument of counsel regarding the impact of *Oscar Mayer.*

In *Bean,* the primary issue before the Ninth Circuit was whether state filing was a prerequisite to a federal suit brought under the ADEA. The *Oscar Mayer* opinion held state filing mandatory but held that compliance with state filing limitations periods was irrelevant to ADEA jurisdictional questions. The rationale for this holding was that a contrary ruling would result in the various state filing limitations periods, in essence, displacing the federal limitations period.

The *Bean* court, without noting the rationale of *Oscar Mayer,* concluded that the *Oscar Mayer* holding

that "state limitations periods are irrelevant" compelled the conclusion that an ADEA claimant in a state with a state law prohibiting age discrimination in employment is automatically entitled to 300 days in which to file with the federal agency.

The issue involved in this case, however does not relate to compliance with state limitations periods. The issue here is whether an ADEA claimant is permitted an additional 120 days to pursue his claim merely by virtue of his being in a dual-law state or, alternatively, whether he must actually resort to the state agency within the basic 180 day filing period provided by §626(d)(1) in order to obtain the extended period provided by §626(d)(2). The only filing periods in question here are federal. The Ninth Circuit did not consider the question in that context and consequently did not consider the appropriate legislative history and appropriate Congressional purposes in question. In short, the Ninth Circuit's decision differs from that reached by the Sixth Circuit below and by the First Circuit in *Ciccone v. Textron, supra,* because the Ninth Circuit's focus was on a question different from that addressed by the Sixth and First Circuits.[10]

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10. In addition, on August 1, 1980 the Third Circuit Court of Appeals entered a Per Curiam opinion in *Davis v. Calgon Corp.,* ..... F.2d ..... (August 1, 1980) reversing its earlier decision in *Davis v. Calgon,* 22 FEP Cases 1961 (3rd Cir. June 10, 1980) (which was in accord with both the decision of the Sixth Circuit below and the decision of the First Circuit in *Ciccone v. Textron*) and, essentially, adopting the position urged by Petitioner here. The Third Circuit stated that: "Regardless of what our own conclusions would be, we find that the Supreme Court's statements in *Mohasco* control disposition of this issue. . . ." For the reasons earlier stated in this Brief, Respondent respectfully submits that *Mohasco* does not control the issue presented here.

CONCLUSION

The Circuit Court's decision construed the ADEA filing provisions consistent with the Congressional purposes and in a manner which neither conflicts with any decision of this Court nor creates any significant conflict in the Circuits so as to justify review on grant of writ of certiorari.

The Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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